Supreme Court, U.S.
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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1994

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

v.

JERRY YOUNG,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA FOURTH CIRCUIT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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39PP

QUESTION PRESENTED

Ostensibly applying the rules set forth in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614 (1981), the Louisiana Fourth Circuit Court of Appeal extended the so-called "turnover duty" to make safe the vessel and its equipment owed by vessel interests to the discharging stevedore, to the method of stowage of the cargo. And, even though any dangers in the stow were concededly open and obvious, the Court rendered a judgment finding both the vessel owner and voyage charterer liable to a longshoreman who was allegedly injured during discharge operations. *Jerry Young v. Armadores de Cabotaje, S.A., et al.,* 617 So.2d 517 (La. App. 4th Cir. 1993).

On June 20, 1994, this Court issued a Writ of Certiorari to the Court of Appeal of Louisiana, Fourth Circuit whereby it was ordered that their judgment in this cause be vacated and the case be remanded for consideration in light of *Howlett v. Birkdale Shipping Co., S.A.,* 512 U.S. ____, 114 S. Ct. 2057, 129 L.Ed.2d 78 (1994).

In its amended opinion issued pursuant to the Writ, the Louisiana Fourth Circuit altered its fact findings and ruled that because of its minimal involvement in the stowage process the vessel owner should be absolved from liability, but that even though the hazards in the stow were again concededly open and obvious, the voyage charterer should now bear the entire liability.

Thus, the question presented is whether the amended decision of the Court of Appeal, Fourth Circuit, State of Louisiana, constitutes a proper response to the Writ of Certiorari issued by this Court.

LIST OF PARTIES

The following are the parties to this proceeding;

Jerry Young, plaintiff-respondent.

Empresa Nacional Siderurgica, S.A.,
defendant-petitioner

Cooper T. Smith Stevedoring Co., Inc.,
intervenor.

Armadores de Cabotaje, S. A., defendant,
was dismissed from the proceedings.

Pursuant to Supreme Court Rule 29.1, Empresa Nacional Siderurgica, S.A. states that it has no parent corporations or non-wholly owned subsidiaries.

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DECISIONS BELOW

The original opinion of the Court of Appeal, Fourth Circuit, State of Louisiana was issued on March 31, 1993, and is reported as *Jerry Young v. Armadores de Cabotaje, S.A., et al.*, 617 So.2d 517 (La. App. 4th Cir. 1993). After the Louisiana Supreme Court's refusal to hear the case, it came before this Court pursuant to a Petition for a Writ of Certiorari filed by petitioner's co-defendant.

This Court issued a Writ of Certiorari to the Court of Appeal, Fourth Circuit, State of Louisiana on June 20, 1994, vacating the judgment and remanding the case for further consideration in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S.Ct. 2057 (1994). (Reported at 114 S. Ct. 2701, 129 L.Ed.2d 830, and see Appendices A, B and C).

The Court of Appeal, Fourth Circuit, State of Louisiana then issued an Order on August 15, 1994 requesting briefs adddressing the instructions contained in the Writ. (See Appendix D). Briefs were duly submitted. The Louisiana Fourth Circuit's amended opinion was issued on November 17, 1994. It is reported at 645 So.2d 1266 and is reproduced in Appendix E. Pursuant to the opinion, the judgment against Armadores de Cabotaje, S.A. (hereinafter "ARCASA") in the amount of 15% of the fault was set aside, but the judgment against Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA") was reinstated, and the amount of fault elevated from 85% to 100%. ENSIDESA requested a rehearing which was denied on December 13, 1994. (See Appendix F). An application for a Writ of Certiorari to the Supreme Court of

Louisiana was then submitted. This Application was denied on March 10, 1995, and is reported at 650 So.2d 1185, and reproduced in Appendix G.

JURISDICTION

The amended opinion of the Court of Appeal, Fourth Circuit, State of Louisiana, was entered on November 17, 1994. Rehearing was denied on December 13, 1994. The Supreme Court of Louisiana denied the Application for a Writ of Certiorari on March 10, 1995. The jurisdiction of this Court is thus invoked pursuant to 28 U.S.C. §1257.

STATUTORY PROVISION INVOLVED

The following statute of the United States of America is involved in this petition:

33 U.S.C. §905(b):

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any arrangements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the

vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

This case arises out of an injury allegedly suffered by an experienced longshoreman, Jerry Young, while offloading a vessel, the M/V LORENA, at the port of New Orleans, in November 1982.

The M/V LORENA, owned and operated by ARCASA, had been voyage chartered by ENSIDESA, the national steel company of Spain, for the purpose of shipping I-beams from Aviles, Spain to Louisiana. ENSIDESA, whose employees were to load the vessel at Aviles, prepared a stowage plan, which was approved by the master of the vessel. The 60 foot I-beams were then stowed in the "H" configuration according to Spanish custom so that looking down the length of the beams from the end they lie in tiers on their flanges resembling the letter "H".

Wooden dunnage was placed between the tiers or layers of beams in the normal way.

The cargo surveyor employed to inspect the stow at loading noted nothing unusual or dangerous. ENSIDESA employed Cooper T. Smith Stevedoring Co., Inc. (hereinafter "Cooper") to offload the vessel in New Orleans. On the vessel's arrival in New Orleans, Cooper's supervisory personnel inspected the vessel and her stow prior to commencing discharge operations. The supervisors gave their longshoremen employees, one of whom was Jerry Young, the approval to offload. The offloading operations proceeded without complaint from the longshoremen or their supervisors. No notations of any dangers in the stow were made in the relevant documentation, and because there was no packaging or covering as such, there was no difficulty with hidden or invisible areas in the stow. In fact, Jerry Young's foreman described the stow as "perfect" and "safe".

Cooper discharged the cargo with its crane barge, the LISA C, which was located between the M/V LORENA and the wharf. The longshoremen were in the holds of the vessel attaching the crane hooks to the bundles of I-beams. At approximately 2:00 p.m. on November 22, 1982, during the second day of discharge, plaintiff claims he sustained injury when a breakout wire used to lift the end of a bundle of beams slipped off, striking him. After plaintiff's injury, the remainder of the cargo of beams was discharged in the same manner, without incident.

Plaintiff filed suit in October 1984 against ARCASA alleging vessel negligence pursuant to the Longshore and

Harbor Workers' Compensation Act, 33 U.S.C. §905(b). In May 1985, the trial court granted leave to Cooper and its compensation insurer to file a petition of intervention seeking to recover compensation benefits paid to or on behalf of the plaintiff. In July 1985, plaintiff filed an amended petition against ENSIDESA alleging fault. In January 1989, ENSIDESA and ARCASA filed cross-claims against one another.

Trial by jury proceeded on April 17, 1989. The cross-claims of ENSIDESA and ARCASA were severed, as was Cooper's petition of intervention. At the trial, the foreman of plaintiff's work gang on the day of the accident testified that he saw nothing dangerous about the stow. He had seen that type of stow many times before, and said it was a "perfect," "safe" stow. All steel beams were loaded in the "H" method at the Port of Aviles in 1982, the year of Young's injury. This was ENSIDESA's customary method of loading from 1956 to 1985, a period of 29 years. Albert Ross, a "marine surveyor," testified on behalf of plaintiff. He inspected the condition of the cargo of steel beams on the M/V LORENA and testified that he could not recall ever seeing a ship stowed with steel beams in the "H" manner. Ross contradicted plaintiff's foreman, testifying that it was a "hazardous" stow, not a "correct" stow. Yet on cross examination, Ross said he had never been a stevedore or a longshoreman. He stated that he was aware that the foreman of plaintiff's gang thought the cargo stow was in perfect condition, and could not recall whether he had informed the Cooper superintendent that he thought the stow was dangerous while he was actually at the vessel. He also had to admit that earlier in February 1982 he may have surveyed the same M/V LORENA loaded with beams

stowed in the "H" configuration. He admitted that he did not know whether the condition of the stow had anything to do with plaintiff's accident.

The jury returned its verdict on April 26, 1989, finding ENSIDESA 85% and ARCASA 15% at fault in causing plaintiff's damages. The jury awarded plaintiff $1,700,000.00 in damages, and the trial court subsequently held that neither ENSIDESA nor ARCASA was entitled to indemnity and/or contribution from the other. The parties ultimately agreed to the amount of the intervention sought by Cooper and its insurer.

ENSIDESA and ARCASA timely filed motions for judgment notwithstanding the verdict, or alternatively, for new trial. The motions were denied by the trial court on September 1, 1989. ENSIDESA and ARCASA thereafter moved for reconsideration of the trial court's refusal to remit the damages award. The trial court denied this motion as well and entered final judgment on October 6, 1989.

ENSIDESA and ARCASA timely appealed to the Louisiana Court of Appeal for the Fourth Circuit. On March 31, 1993, the Fourth Circuit issued its opinion and ruling, reversing in part, amending and affirming as amended the judgment of the trial court. The ruling was based on the finding that even though the hazards in the stow were open and obvious, the defendants had breached the "turnover duty" to the stevedore. The Fourth Circuit however reduced plaintiff's damages to $1,106,046.00, but denied ENSIDESA relief from the trial court's multiple abuses of discretion. The Fourth Circuit went even further, however, to hold that although the jury found ARCASA to

be 15% negligent, ENSIDESA owed indemnity to ARCASA for ARCASA's own negligence, despite the lack of any clear or specific language in the applicable charter to that effect. ENSIDESA's Petition for Rehearing was denied on May 12, 1993.

Thereafter on July 11, 1993, ENSIDESA filed an Application for Writ of Certiorari or Review to the Louisiana Supreme Court. Both plaintiff and co-defendant ARCASA also filed timely writ applications. The Louisiana Supreme Court denied all three writ applications on October 1, 1993.

As a result of this denial, both ENSIDESA and ARCASA applied to this Court for a Writ of Certiorari raising issues of procedural and substantive law. ARCASA's application was docketed on December 23, 1992, and ENSIDESA's on December 28, 1993. While ENSIDESA'S petition was denied, ARCASA's was granted on June 20, 1994, in the following terms:

> [I]t is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for consideration in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____ [1994].

(Reported at 114 S. Ct. 2701, 129 L.Ed.2d 830). (See Appendix C).

Consequent upon this ruling, the Fourth Circuit issued an Order on August 15, 1994, requiring the parties

to submit briefs. (See Appendix D). The Court noted that "[o]ur reconsideration of this case will be strictly limited to the issues affected by this recent U.S. Supreme Court decision." All parties submitted briefs on remand. On November 17, 1994, the Fourth Circuit issued its judgment, reversing in part, amending and affirming as amended its earlier judgment. (See Appendix E).

The Court conceded that the hazards in the stow, if any, were open and obvious and that there could therefore be no breach of the corollary to the turnover duty, *i.e.* the turnover duty to warn. However, they concluded that the fact that the hazards were open and obvious had no bearing on the turnover duty itself, and that this duty extended to the cargo as well as the ship. They then decided that because ARCASA played a "minimal role" in the preparation of the stowage plan, ARCASA's 15% fault should be set aside, and ENSIDESA should now be found 100% at fault for breaching the turnover duty. The judgment was amended accordingly.

On December 1, 1994, ENSIDESA applied for a rehearing, which was refused on December 13, 1994. (See Appendix F). ENSIDESA timely filed an Application for a Writ of Certiorari in the Supreme Court of Louisiana, seeking to require the Louisiana Fourth Circuit to follow this Court's Writ. This Application was denied on May 10, 1995. (See Appendix G). Hence this Petition.

REASONS FOR GRANTING THE WRIT

The primary reason for granting this Petition is that the Court to whom this Court's prior Writ was addressed

did not follow the instructions contained therein. The Louisiana Fourth Circuit misapplied the clear exposition of the law as set forth in *Howlett* and then used specious logic to reinstate and rearrange the judgment that this Court vacated. Their findings that the "open and obvious" defense does not apply to the turnover duty, and that the turnover duty extends to the cargo are both incorrect, and the use of the "minimal role" criterion is simply a device used to achieve a desired result, and is nowhere to be found in *Howlett.*

It is submitted that in *Howlett*, this Court reinforced the original formulation of the vessel interests' duties to longshoremen that were so narrowly articulated by Justice White in *Scindia.* In *Scindia* he set forth a broad statement of vessel *immunity,* tempered by a number of closely difined *exceptions,* the so-called *Scindia* duties. The reasons for creation of this framework have been well documented. The entire legislative intent embodied in the 1972 amendments to the Longshore and Harbor Workers' Compensation Act was firstly to place most of the responsibility for injuries to longshoremen on the stevedores themselves, where, according to this Court, it belongs, and secondly to eliminate the almost strict liability of the vessel.

In *Howlett*, Justice Kennedy's formulation of the first *Scindia* duty, the turnover duty, and its corollary, the turnover duty to warn, is, to use his own word, "narrow". He articulated what is known as the turnover duty as follows:

> A vessel must exercise ordinary care under the circumstances to turn over the ship and its equip-

> ment and its appliances in such condition that an expert and experienced stevedoring contractor, mindful of the dangers he should expect to encounter, arising from the hazard of the ship's service or otherwise, will be able by the exercise of ordinary care to carry on cargo operations with reasonable safety to person and property.

The corollary was stated thus:

> A corollary to the turnover duty requires the vessel to warn the stevedore of any hazards on the ship, or with respect to its equipment, so long as the hazards are known to the vessel, or should be known to it in the exercise of reasonable care, and would likely be encountered by the stevedore in the course of his cargo operations, are not known by the stevedore, and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.

His summary reads as follows:

> In sum, the vessel's turnover duty to warn of latent defects in the cargo stow and cargo area is a narrow one. The duty attaches only to latent hazards, defined as hazards that are not known to the stevedore and that would neither be obvious to nor anticipated by a skilled stevedore in the competent performance of its work. Furthermore, the duty encompasses only those hazards that are known to the vessel or should be known to it in the exercise of reasonable care.

(*Howlett*, at 114 S. Ct. 2063, 2067; citations and quotation

marks omitted.)

It should be noted that there were no disjunctives used in the expression of these rules by Justice Kennedy. The conjunctive "and" is used throughout. Most importantly, the test is stated in terms of a "latent hazard" that is not known to the stevedores *and* would neither be obvious nor anticipated. Under the teaching of *Scindia*, as clarified and restricted by *Howlett*, there can clearly be no liability on the part of a vessel interest if the alleged danger is not hidden.

In spite of Justice Kennedy's description of these duties as "related", the Louisiana Fourth Circuit irreconcilably separated them. Part of this separation was the court's flat statement that, although the open and obviousness of the alleged danger is a complete defense to a claim based on the breach of the corollary to the first *Scindia* duty, it is not a defense to a claim under the first duty itself. (See pages 3 and 4 of the Opinion at Appendix E). In other words, it may be a defense to the turnover duty to warn but not to the turnover duty itself. With respect, this makes no sense and is an incorrect statement of the law.

ENSIDESA submits that if this were a correct statement of the law, there would have been no reason for this Court to have issued the Writ, and to do it on the terms that it did. The Louisiana Fourth Circuit's original decision was based on ARCASA's and ENSIDESA's breach of the first *Scindia* duty, *i.e.* the turnover duty. If the open and obviousness of the hazard was not a defense to a claim based on a breach of this duty, why would this Court have ordered that the judgement be vacated and the case recon-

sidered in the light of *Howlett*? In other words, if this Court meant the defense only to apply to the corollary, and there was no breach of the corollary duty in this case, there would have been no reason to grant the Writ and vacate the judgment.

Moreover, there is also the ruling in the case of *Riggs v. Scindia Steam Navigation Co. Ltd.*, 8 F.3d 1442 (9th Cir. 1993), vacated, 512 U.S. ____, 114 S. Ct. 2701, 129 L.Ed.2d 830 (1994), which indicates that the open and obviousness of the alleged hazards are a defense to claims under both the turnover duty and the turnover duty to warn. In *Riggs*, the United States Court of Appeals for the Ninth Circuit reversed the district court's summary judgment which absolved the vessel from liability for breach of the turnover duty because the condition of the stow was open and obvious. The Ninth Circuit concluded that the onloading stevedore had stowed the cargo improperly, but the cargo was placed in the vesel's hold in an open and obviously hazardous manner. The district court had found that the vessel interests had no legal duty to prevent or alleviate the unsafe working conditions in the hold because the dangers were open and obvious to the longshore workers. In his appeal, plaintiff Riggs argued that the turnover duty to warn is distinguishable from the turnover duty to correct hazardous conditions in the stow, otherwise known as the turnover duty of "safe condition", *i.e.* the first *Scindia* duty. He also argued that the vessel had an obligation to correct open and obvious hazardous conditions. A breach of this duty would lead to liability, according to Riggs. In other words, the open and obvious nature of the hazard is not a defense to a claim for breach of the turnover duty of safe condition itself, as opposed to the corollary duty to

warn.

The Ninth Circuit agreed with Riggs, finding that the turnover duty of safe condition extended to protect discharging longshoremen against open and obvious hazards in the cargo stow, as a matter of law. Thus, the open and obvious nature of the hazard in the eyes of the Ninth Circuit, was not a defense to the breach of the first *Scindia* duty. Because of the split in the circuits on this issue, this Court granted the vessel's Application for a Writ of Certiorari, and on the same day as the Writ was issued in this case, vacated the Ninth Circuit's judgment and remanded the case for further consideration in the light of *Howlett.* As a result, the Ninth Circuit issued the following order on remand:

> The Supreme Court vacated our opinion, reprinted at 8 F.3d 1442, and remanded the case to this Court for further consideration of *Howlett v. Birkdale Shipping Co. S.A.*, 114 S. Ct. 2057, 2064 (1994). Accordingly, consistent with the *Howlett* decision, we now affirm the district court's grant of summary judgment to the vessel. The district court's decision is AFFIRMED.

See: 35 F.3d 1466, (9th Cir. 1994).

The Ninth Circuit has, with respect, properly interpreted *Howlett* to mean that the vessel interest's turnover duty of safe condition does not extend to open and obvious hazards in the stow. Moreover, according to *Howlett*, the turnover duty relates to the vessel and its equipment. The turnover duty to warn however, *may* extend to latent

hazards in the stow. *Id.* at 2064. The Louisiana Fourth Circuit simply glossed over this distinction without a backward glance. Thus, vessel interests have no duty to warn of *or* to correct hazards in the cargo stow that are open and obvious. The fact that the hazards are open and obvious is a defense to claims for breach of *both* the turnover duty to warn and the turnover duty itself. The Louisiana Fourth Circuit is incorrect in deciding that the defense is effective in only one instance and not the other.

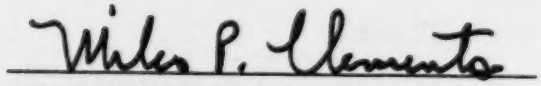
It is also clear that the Louisiana Fourth Circuit, in order to reach its desired result, changed its fact findings to fit within its interpretation of *Howlett*. Because the court felt precluded from deciding that there had been a breach of the turnover duty to warn by its own finding that the hazards in the stow were open and obvious, they confined themselves to the turnover duty itself. Having earlier found that both ARCASA and ENSIDESA had breached this duty, and refusing to concede that the open and obvious nature of the hazards in the stow had any bearing on the turnover duty itself, they found a way to absolve ARCASA by simply declaring that their involvement in the stow was "minimal", thus giving them a method to erase a 15% finding of fault that they had earlier affirmed. ENSIDESA's liability was not only affirmed, but was increased to 100%. With respect, it is submitted that this violates the Writ issued by this Court on June 20, 1994.

The Louisiana Fourth Circuit should be ordered to vacate its amended judgment, and again be instructed to follow the ruling in *Howlett*, which will result in the correct finding, namely that because of the open and obvious condition of any hazards in the stow there can be no liability to a longshoreman.

CONCLUSION

ENSIDESA submits that the Louisiana Fourth Circuit's decision ignores the parameters of this Court's prior Writ, and as such conflicts with the applicable decision of this Court. For these reasons ENSIDESA respectfully requests that the Court grant this Petition for Writ of Certiorari.

Respectfully submitted,



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APPENDIX A

SUPREME COURT OF THE UNITED STATES

NO. 93-1068

ARMADORES de CABOTAJE, S.A.,
Petitioner

v.

JERRY YOUNG

ORDER ALLOWING CERTIORARI. Filed June 20, 1994.

The petition herein for writ of certiorari to the Court of Appeal of Louisiana, Fourth Circuit, is granted.

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 20, 1994

Mr. Miles P. Clements
2100 Pan American Life Center
601 Poydras Street
New Orleans, LA 70130-6097

Re: Armadores de Cabotaje, S.A.
v. Jerry Young
No. 93-1068

Dear Mr. Clements:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for further consideration in light of Howlett v. Birkdale Shipping Co., S. A., 512 U. S. —— (1994).

Very truly yours,

/s/ William K. Suter

William K. Suter, Clerk

APPENDIX C

SUPREME COURT OF THE UNITED STATES

NO.

93-1068

ARMADORES de CABOTAJE, S.A.,
Petitioner

v.

JERRY YOUNG

ON WRIT OF CERTIORARI to the Court of Appeal of Louisiana, Fourth Circuit.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated with costs and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit, for further consideration in light of *Howlett v. Birkdale Shipping Co., S.A.,* 512 U. S. ____ (1994).

IT IS FURTHER ORDERED that the petitioner Armadores de Cabotaje S.A., recover from Jerry Young ($300.00) Three Hundred Dollars for its costs herein expended.

June 20, 1994

Clerk's costs: $300.00

APPENDIX D

JERRY YOUNG	*	No. 90-C-1107
VERSUS	*	COURT OF APPEAL
ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA

ORDER

On June 20, 1994 the United States Supreme Court vacated the decision rendered by this court in the above-numbered and entitled case and remanded the case to us for "further consideration in light of" *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____ (No. 93-670, June 13, 1994).
Accordingly,

IT IS ORDERED that all parties in the above-numbered and entitled case file additional briefs within fifteen (15) days, if so desired, addressing this case only insofar as it may be affected by *Howlett v. Birkdale Shipping Co., S.A., supra*. Our reconsideration of this case will be strictly limited to issues affected by this recent U.S. Supreme Court decision. We will reconsider this case on the briefs only, with no further oral argument.

A TRUE COPY

NEW ORLEANS AUG 15 1994
/s/ Illegible, CLERK
COURT OF APPEAL FOURTH CIRCUIT

New Orleans, Louisiana this 15th day of August 1994.

/s CRW

Judge Charles R. Ward

/s/ JBA

Judge Joan Bernard Armstrong

/s/ SRP

Judge Steven R. Plotkin

APPENDIX E

JERRY YOUNG	No. 90-C-1107
versus	COURT OF APPEAL
ARMADORES de CABOTAJE, S.A. AND K & B EQUIPMENT COMPANY, INC.	FOURTH CIRCUIT
	STATE OF LOUISIANA

APPEAL FROM
CIVIL DISTRICT COURT, FOR THE
PARISH OF ORLEANS
NO. 84-17780, DIVISION "I"
HONORABLE BERNETTE, J. JOHNSON, JUDGE

JOAN BERNARD ARMSTRONG
JUDGE

(Court composed of Judge Charles R. Ward, Judge Joan Bernard Armstrong and Judge Steven R. Plotkin)

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NOV 17 1994

REVERSED IN PART:
AMENDED: AFFIRMED
AS AMENDED.

Plaintiff Jerry Young, a longshoreman, filed this suit pursuant to § 905(b), of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*, against Armadores de Cabotaje, S.A. ("ARCASA") and Empresa Nacional Siderugica, S.A. ("ENSIDESA"). Defendants ARCASA and ENSIDESA appealed from a judgment in favor of plaintiff and on March 31, 1993 this court reversed the judgment of the trial court in part, amended it, and affirmed the judgment as amended.[1] On June 20, 1994 the United States Supreme Court granted ARCASA's application for writ of certiorari, vacated this court's decision, and remanded the case "for further consideration in light of *Howlett v. Birkdale Shipping Co.*, S.A., 512 U.S. (1994)."[2]

ENSIDESA manufactures steel beams in Spain. It chartered the M/V LORENA, owned by ARCASA, to ship a cargo of steel beams to the port of New Orleans. ENSIDESA loaded and stowed the cargo of beams in Spain. Cooper Stevedoring Company, Inc. ("Cooper") contracted with ENSIDESA to unload the beams in New Orleans. Plaintiff, an employee of Cooper, was injured in the cargo hold of the M/V LORENA while unloading the steel beams, Plaintiff claimed the cargo of steel beams had been improperly stowed, making it dangerous to unload and

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[1] *Young v. Armadores Cabotaje, S.A.*, 617 So.2d 517 (La. App. 4th Cir. 1993), *writs denied*, 625 So.2d 170, 171 (La. 1993), *cert. granted, vacated, remanded, Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ____, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

[2] *Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ____, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

resulting in his injury during the unloading process.[3]

In our original opinion we stated the law as set forth by the U.S. Supreme Court and interpreted by lower federal courts. We stated:

> In the seminal case of *Scindia Steam Navigation Co., Ltd. v. De Los Santos,* 451 U.S. 156, 101 S.Ct 1614, 68 L.Ed.2d 1 (1981), the U.S. Supreme Court defined the duties owed by a vessel owner to the stevedore and his longshoremen. These duties were succinctly stated by the 5th U.S. Circuit Court of Appeal in *Hill v. Texaco,* 674 F.2d 447, 450-51 (5th Cir. 1982):
>
> > First, *before the stevedore begins his work,* a shipowner must exercise care to make safe the portions of the ship that it turns over to the stevedore. In discharging this duty the ship may rely on the stevedore's performing its task with reasonable care. The shipowner must also warn the stevedore of hidden unsafe conditions on the ship of which the ship is, or should be, aware.
> >
> > Second, *once the stevedore begins its operations,* the shipowner has no general duty to supervise work or to inspect the area assigned to the stevedore, unless custom, contract, or law imposes such a duty on the shipowner. The shipowner need not monitor the stevedore's operations; rather, the shipowner is entitled to rely on the stevedore's expertise and reasonableness.

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[3] A full recitation of the facts is contained in our original opinion, 617 So.2d at 517.

> Third, the Supreme Court made an exception to the general absence of a duty of the shipowner to protect employees of the stevedore *during cargo operations.* The duty arises when two conditions are fulfilled. If the shipowner becomes aware during the stevedore's work that the ship or its gear poses a danger to the longshoremen, and *if* the shipowner also learns that the stevedore is acting unreasonably in failing to protect the longshoremen against the danger, then the shipowner acquires a duty to intervene and protect the longshoremen. The shipowner can have knowledge of a defect if the defect develops during the stevedore's operations and the shipowner had actual knowledge, or if the defect exists at the outset and the ship 'must be deemed' to have knowledge of it.
>
> (footnotes omitted) (emphasis ours)

In *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981), the U.S. Fifth Circuit described the judicial balancing of supervisory duties between the vessel owner and the stevedore:

> The shipowner is therefore responsible for eliminating dangerous conditions which exist at the outset of the stevedoring operations, but has 'no duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations.' It is the stevedore who must see to the safety of cargo operations. (citations omitted)

Id. at 115.

In *Lemon*, the court held that a vessel owner could be liable under *Scindia* if it knew or should have known of an improper loading technique and failed to take actions to either correct the stowage or warn the offloading stevedore's employees of the dangerous condition contained in the stow. *Lemon*, 656 F.2d, at 116. In *Harris v. Flota Mercante Grancolumbiana, S.A.*, 730 F.2d 296, 299 (5th Cir. 1984), the same court, citing *Lemon*, again held that a vessel owner could be held liable for negligently stowed cargo which caused an offloading longshoreman to be injured. See in accord, *Woods v. Sammisa Co., Ltd., supra.*

As in *Lemon* and *Harris*, we are concerned in the instant case not with conditions which develop *after* offloading stevedoring operations begin, but with a condition present when the vessel is turned over to the stevedore. The alleged negligence "occurred in the method and manner of stowing cargo that was delivered to the longshoremn and stevedore." *Harris, supra* at 299. Therefore, although the alleged dangerous condition caused by the crushed dunnage on the M/V LORENA became more apparent as the longshoremen got deeper into the stow, the second and third *Scindia* duties are not relevant to our analysis. The primary burden contemplated by *Scindia* was the duty of the vessel owner to turn over to the offloading stevedore a vessel which could be offloaded with reasonable safety. This is the focus of our analysis.

617 So.2d at 526, 527.

We found both ARCASA, as the shipowner, and ENSIDESA, as time-charterer and loading stevedore, liable for breaching the first *Scindia* duty, the duty to turn over (the "turnover duty") the ship in a condition such that an expert and experienced stevedore could, with the exercise of ordinary care, safely unload the cargo. We rejected any notion that either ARCASA or ENSIDESA breached a duty to warn of any hidden unsafe conditions, finding that the danger presented by the stow was open and obvious. We found that the evidence furnished a basis for a conclusion that the manner in which the beams had been stowed resulted in a condition presenting an unreasonable risk of harm to an expert and experienced unloading stevedore exercising ordinary care or reasonable safety. The evidence supported the finding that ARCASA had participated in preparing the stowage plans for the improperly stowed steel beams.

In *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, S.Ct. 2057, 129 L.Ed.2d 830 (1994), the U.S. Supreme Court granted certiorari in a case from the U.S. Court of Appeal for the Third Circuit "to resolve a conflict among the circuits regarding the scope of the shipowners' duty to warn of latent hazards in the cargo stow." *Id.* at 2062. While the Court's decision did not specifically address the turnover duty itself, only the duty to warn, it characterized the duty to warn as a "corollary" of the turnover duty. *Id.* at 2063. The decision made clear, as we stated in our original decision, that the duty to warn does not apply to conditions presenting an open and obvious danger, only to latent hazards. *Id.* at 2064.

In *Howlett* the Court rejected the suggestion that

a shipowner must make reasonable inspections during stevedoring operations (loading) to ensure a proper stow and to detect any hazards or defects before they become hidden, reasoning that such a duty "would require vessels to inject themselves into matters beyond their ordinary province," i.e., stevedoring operations, 114 S.Ct. at 2066. In reaching this conclusion the Court fully considered the role of the vessel and its crew in "preparing a stowage plan, which governs where each cargo will be stowed on the ship." *Id.* The Court also rejected the argument that the vessel need make reasonable inspections after the completion of loading stevedoring operations to discover hazards in the stow, stating that any such hazards would normally be discovered by a reasonably competent unloading stevedore. 114 S.Ct. 2066, 2067.

The *Howlett* Court distinguished the degree of operational control exercised over the cargo stow with that exercised over the ship itself, its gear, equipment and tools. In *Howlett* the U.S. Supreme Court evidences a clear intent to narrowly limit the liability of a vessel owner under 33 U.S.C. § 905(b) for injuries incurred as a result of a dangerous cargo stow. This court's affirmation of the finding of liability on the part of ARCASA was primarily based on its participation in preparing the stowage plan. The 15% of the total fault attributed to ARCASA by the jury, which was affirmed by this court, reflects the minimal role of the vessel owner.

Considering the clear thrust of *Howlett*, we conclude that the minimal role played by ARCASA in participating in the preparation of the stowage plan which detailed the placement and levelling of the cargo - not whether the

beams were to be stowed on the "H" (the cause of the dangerous condition in the stow) - is not sufficient to support a finding of liability as to ARCASA. ENSIDESA, both the time-charterer of the vessel and the loading stevedore, is solely and directly responsible for the dangerous condition presented by the cargo which it alone stowed on the M/V LORENA. The judgment of the trial court will be amended accordingly.

For the foregoing reasons, together those set forth in our original decision not inconsistent with the foregoing, we reverse that portion of the trial court judgment finding defendant Armadores de Cabotaje, S.A. 15% at fault and render judgment in favor of defendant Armadores de Cabotaje, S.A. and against plaintiff Jerry Young, dismissing with prejudice all of his claims against that company as well as any cross claims against it. We further amend the judgment of the trial court to render judgment in favor of plaintiff Jerry Young and against defendant Empresa Nacional Siderugica, S.A. for all damages to plaintiff Jerry Young. We further amend the judgment of the trial court to award damages to plaintiff Jerry Young, excluding past medical expenses,[4] as follows:

---

[4] The issue of past medical expenses was not submitted to the jury and is not at issue on appeal.

Future medical expenses:	$ 274,949.00
Past physical and mental pain and suffering and disability from date of accident to date of trial:	$ 250,000.00
Future physical and mental pain and suffering and disability	$ 250,000.00
Past loss of earnings or earning capacity from date of accident to trial:	$ 141,365.00
Future loss of earnings or earning capacity:	$ 189,732.00
TOTAL	$1,106,046.00

We affirm the judgment as amended and in all other respects.

REVERSED IN PART: AMENDED: AFFIRMED AS AMENDED.

APPENDIX F

COURT OF APPEAL, FOURTH CIRCUIT
STATE OF LOUISIANA

Clerk's Office, New Orleans, Dec 13, 1994

DEAR SIR:

REHEARING WAS THIS DAY REFUSED
IN THE CASE ENTITLED

JERRY YOUNG v. ARMADORES de CABOTAJE, S.A.,
ET AL,

No. 90-CA-1107

Very truly yours,

DANIELLE A. SCHOTT
CLERK OF COURT

APPENDIX G

THE SUPREME COURT OF THE STATE OF LOUISIANA

JERRY YOUNG

VS. NO. 95-C - 0113

ARMADORES de CABOTAJE,
S.A. AND K & B EQUIPMENT COMPANY, INC.

- - - - - -

IN RE: Empresa Nacional SiderurgicaSA; - Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "I" Number 84-17780; to the Court of Appeal, Fourth Circuit, Number 90CA-1107

- - - - - -

March 10, 1995

Denied.

JPV
PFC
WFM
JLD
JCW
HTL
CDK

JOHNSON, J. not on panel; recused.

Supreme Court of Louisiana
March 10, 1995

/s/ Illegible

Clerk of Court
For the Court

(2)

NO. 94-2034

Supreme Court, U.S.
FILED
JUL 17 1995
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

VERSUS

JERRY YOUNG,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT
COURT OF APPEAL

BRIEF FOR RESPONDENT

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22pp

QUESTION PRESENTED

Petitioner, Empresa Nacional Siderurgica, S.A. (ENSIDESA), suggests that the issue presented by its petition is whether the amended decision of the Louisiana Fourth Circuit Court of Appeal constitutes a proper response to the writ of certiorari issued by this Court.

Respondent respectfully suggests that the court of appeal's original and amended decisions as to the liability of ENSIDESA are entirely consistent with this Court's pronouncements in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and that ENSIDESA's petition for a writ of certiorari herein should be denied.

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MAY IT PLEASE THE COURT:

STATEMENT OF THE CASE

Respondent, Jerry Young, a longshoreman, brought suit in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking damages for injuries he sustained while offloading steel beams from a vessel, the M/V LORENA, in the Port of New Orleans, Louisiana. The defendants were Empresa Nacional Siderurgica, S.A. (ENSIDESA), a Spanish steel manufacturer that had acted both as the loading stevedore of the cargo in Aviles, Spain, and the charterer of the vessel for the voyage from Spain to New Orleans, and Armadores de Cabotaje, S.A. (ARCASA), the owner and operator of the vessel. The plaintiff claimed that defendant ARCASA was liable for negligence under section 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et seq.*; 33 U.S.C. § 905(b), hereinafter referred to as "905(b)." The plaintiff

claimed that defendant ENSIDESA was liable in two capacities: first, as the stevedore that had loaded the vessel, it was liable for negligence under the general maritime law; and second, as charterer of the M/V LORENA, it was liable under 905(b), also.

The matter went to trial in May 1989, and the jury returned a verdict in favor of Mr. Young against ENSIDESA in its capacity both as the loading stevedore and as charterer of the vessel.[1]

The matter was appealed to the Louisiana Fourth Circuit Court of Appeal, which affirmed the judgment against ENSIDESA both in its role as charterer of the vessel and in its role as loading stevedore, holding as follows:

> Based upon the evidence, we are unable to say that the jury would have been clearly wrong to conclude

---

[1]At the time of trial ENSIDESA made no objections to the Court's jury instructions as to its duties as loading stevedore under the general maritime law.

> that a "reasonable ... time charterer would have perceived the dangers presented by the [stow]." [Citation omitted.] In addition, ENSIDESA, as loading stevedore, clearly bears responsibility for the dangerous condition presented by the beams which it stowed. ENSIDESA breached its duty of reasonable care under all of the circumstances, in failing to load the vessel so that it could be offloaded with reasonable safety.

Young v. Armadores de Cabotaje, S.A., 617 So. 2d 517, 528-29 (La. App. 4th Cir. 1993).

ENSIDESA timely filed a writ of certiorari with the Louisiana Supreme Court. On October 1, 1993, the court denied ENSIDESA's writ application. *Young v. Armadores de Cabotaje, S.A.*, 625 So. 2d 170 (La. 1993).

ENSIDESA next filed a petition for writ of certiorari with the United States Supreme Court, making the sole allegation of error that the application of Louisiana Code of Evidence article 606 B to prohibit judicial consideration of jury affidavits allegedly showing racial bias and prejudice against

ENSIDESA denied ENSIDESA due process of law[2]. On February 22, 1994, ENSIDESA's petition for writ of certiorari was denied. *Empresa Nacional Siderurgica, S.A. v. Young*, 114 S. Ct. 1067 (1994).

Following the denial of ENSIDESA's petition for writ of certiorari by the United States Supreme Court, ENSIDESA took no further action. Specifically, ENSIDESA did not file a petition for rehearing pursuant to United States Supreme Court rule 44.2.

Later, after the 25-day period for filing for rehearing had elapsed, the United States Supreme Court granted the petition for a writ of certiorari applied for by ENSIDESA's co-defendant, ARCASA. *Armadores de Cabotaje, S.A. v. Young*, ___ U.S. __, 114 S. Ct. 2701, 129 L. Ed. 2d 830 (1994). In

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[2]Since no argument was made concerning ENSIDESA's liability under the general maritime law as loading stevedore, the holding by the court of appeal is the law of the case and should not be subject to review now. *See infra* pp. 12-13.

granting ARCASA's writ, Your Honors vacated the judgment of the Louisiana Fourth Circuit Court of Appeal (*Young v. Armadores*, 617 So. 2d 517) and remanded for further consideration in light of your opinion in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. _____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994).

Since *Howlett v. Birkdale Shipping Co., S.A.*, dealt solely with the liability of a vessel pursuant to 905(b) and in no way addressed the question of the liability of a stevedore for negligent loading of cargo, ENSIDESA'S liability for negligence as the stevedore that had loaded the steel cargo on the M/V LORENA could not have been, and was not, affected by Your Honors' order. In its amended decision the Louisiana Fourth Circuit Court of Appeal reversed its decision as to the liability of ARCASA under 905(b) but affirmed the liability of ENSIDESA both under

905(b) and for negligence as the loading stevedore, holding as follows:

> **ENSIDESA, both the time-charterer of the vessel and the loading stevedore, is solely and directly responsible for the dangerous condition presented by the cargo which it alone stowed on the M/V LORENA.**

Young v. Armadores de Cabotaje, S.A., 645 So. 2d 1266, 1269 (La. App. 4th Cir. 1994) (bold added).

ENSIDESA's petition for a writ of certiorari to the Louisiana Supreme Court was denied, *Young v. Armadores de Cabotaje, S.A.*, 650 So. 2d 1185 (La. 1995), and this petition followed.

SUMMARY OF ARGUMENT

In both its original and amended opinions, the Louisiana Fourth Circuit Court of Appeal held that the jury had properly found ENSIDESA liable both in its role as the stevedore that had negligently loaded the M/V

LORENA and as the time-charterer of the vessel. ENSIDESA argues that the court of appeal erred in finding it liable as the charterer of the vessel under 905(b) and completely glosses over its liability as loading stevedore. Because ENSIDESA here actually created the hazardous condition by its negligent stowage of the cargo in Aviles, Spain, the Louisiana Fourth Circuit Court of Appeal's decision holding it liable under 905(b) is entirely consistent with Your Honors' opinion in *Howlett*, 512 U.S. _____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and the Ninth Circuit Court of Appeals' opinion in *Riggs v. Scindia Steam Nav. Co. Ltd.*, 35 F.3d 1466 (9th Cir. 1994). Moreover, since ENSIDESA here was negligent in its role as loading stevedore, its liability in that capacity is unaffected by 905(b).

ENSIDESA'S WRIT APPLICATION SHOULD BE DENIED

ENSIDESA argues that the decision below is in conflict with the United States Supreme Court's decision in *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ____, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994), and the decision of the Ninth Circuit Court of Appeals in *Riggs v. Scindia Steam Nav. Co., Ltd.*, 35 F.3d 1466 (9th Cir. 1994). But this is not the case.

In *Howlett* the Supreme Court made clear that under 905(b) the vessel's turnover duty to warn "encompasses only those hazards that 'are known to the vessel or should be known to it in the exercise of reasonable care.' [Citation omitted.]" 512 U.S. at ___, 114 S. Ct. at 2067. Rejecting cases holding that the vessel had a duty to know of hazards created during loading operations, the Supreme Court concluded that "the exercise of reasonable care does not require the

shipowner to supervise the ongoing operations of the loading stevedore (or other stevedores who handle the cargo before its arrival in port) or to inspect the completed stow." *Howlett*, 512 U.S. at _____, 114 S. Ct. at 2067.

In *Riggs. v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993), the plaintiff's sole contention against the vessel under 905(b) "consisted of its failure to supervise properly the cargo loading operations of the foreign stevedore." 8 F.3d at 1443. Accordingly, on remand, after *Howlett*, the Ninth Circuit held that the district court had correctly granted summary judgment since the vessel owner could not be held liable under 905(b) for failing to supervise the cargo loading operations of a third-party stevedore. *Riggs* v. Scindia Steam Nav. Co., 35 F.3d 1466 (9th Cir. 1994).

But here the claim against ENSIDESA is entirely different because ENSIDESA itself

(not an independent stevedore) failed to properly conduct (not supervise) cargo loading operations. ENSIDESA's liability was founded on its own negligent stowage of the cargo, and not upon the negligence of another party.

Further, ENSIDESA suggests that, after *Howlett,* it cannot be liable under 905(b) for creating a dangerous condition because the danger was "open and obvious." But this has never been the law. Rather, *Scindia Steam Nav. Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981), and *Howlett* both merely limited the vessel's duty to warn of dangerous conditions to those dangers that were latent and not obvious. But here the Louisiana Fourth Circuit Court of Appeal's finding of liability against ENSIDESA was founded upon its negligence in creating the dangerous stow, and not upon its failure to warn.

Finally, ENSIDESA would seemingly suggest that Your Honors' conclusions as to the scope of duties under 905(b) in *Scindia* and *Howlett* would apply to limit not only its liability as vessel owner, but also its liability as an onloading stevedore under the general maritime law. This argument should be rejected for three reasons.

First, ENSIDESA has not properly reserved this issue for review. At trial ENSIDESA accepted without objection the court's jury instructions as to its duties under the general maritime law. Like rule 51 of the Federal Rules of Civil Procedure, Louisiana's Code of Civil Procedure article 1793 C requires that an objection to a jury instruction be made in order to preserve the claim for appellate review. *Belle Pass Terminal, Inc. v. Jolin, Inc.*, 634 So. 2d 466 (La. App. 1st Cir. 1994). Further, in ENSIDESA's first appeal, its first writ to the Louisiana Supreme Court, and its first

petition here, ENSIDESA never raised any issue with respect to the jury's finding of liability based upon the general maritime law. Your Honors have previously held that the Supreme Court will not ordinarily decide questions not raised in the lower courts, especially where the party alleging error has failed to object to jury instructions in the trial court. *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 107 S. Ct. 1114 (1987). This rule should certainly apply here.

A second reason to reject ENSIDESA's argument is that the court of appeal's first decision holding ENSIDESA liable under the general maritime law is now the law of the case.

> An appellate court decision rendered at one stage of a case constitutes the "law of the case" in all succeeding stages. The first appellate opinion "'establishes the law which other courts owing obedience to it *must* and which it itself will, normally, apply to the same issues in subsequent proceedings in the same case.'" The scope of the doctrine, however, is limited: It "applies

> only to issues that were decided in the former proceeding and does not pertain [to] questions that might have been decided but were not."

Knotts v. United States, 893 F.2d 758, 761 (5th Cir. 1990) (footnotes omitted).

Courts apply the law of the case for several reasons:

> The avoidance of indefinite relitigation of the same issue; the desirability of consistency of the result in the same litigation; and the efficiency, and the essential fairness to both parties, of affording a single opportunity for the argument and decision of the matter at issue.

Day v. Campbell-Grosjean Roofing & Sheet Metal Corp., 256 So. 2d 105, 107 (La. 1971).

Here, fairness should require that the doctrine be applied. ENSIDESA had the opportunity to raise this issue on its first appeal and did not do so. Nor did it raise this issue in the Louisiana Supreme Court or in its first petition to this Court.

A third reason Your Honors should reject ENSIDESA's argument that *Howlett* changed <u>the</u>

law with respect to the duties of a loading stevedore vis-a-vis an offloading stevedore is that there is nothing in the decision to suggest such an intent.

Precisely this issue was considered by the United States Fifth Circuit Court of Appeals in *Couch v. Cro-Marine Transport, Inc.*, 44 F.3d 319 (5th Cir. 1995). In *Couch*, the plaintiff, an employee of the offloading stevedore, sued a loading stevedore, NOSC, for alleged negligence in the stowage of steel cargo. After a verdict in the plaintiff's favor, the loading stevedore appealed and argued that it could not be liable under 905 B because "its stow constituted an open and obvious condition, therefore not triggering a breach of the first *Scindia* duty to warn of hidden defects." 44 F.3d at 324. The court of

appeal rejected the loading stevedore's argument, reasoning as follows:

> *Scindia* and *Howlett* are section 905(b) cases brought against shipowners and do not support [the loading stevedore's] contention that the *Scindia* standard should apply in this case, a negligence suit under the general maritime law against a party other than the vessel owner.

Couch, 44 F.3d at 325.

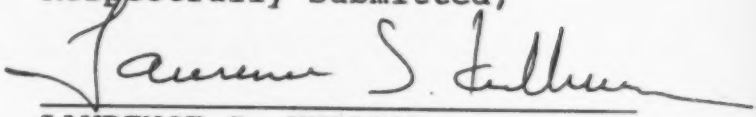
The Fifth Circuit then held that the duty of a loading stevedore is to load the cargo so that an expert and experienced stevedore will be able to discharge a cargo with reasonable safety and affirmed the district court's judgment in the plaintiff's favor. *Couch*, 44 F.3d at 327. The same rule should apply here. The duty of reasonable care owed by Ensidesa as a foreign loading stevedore is unaffected by 905(b), Scindia or Howlett, and the Louisiana court of appeal's decision so holding is correct.

CONCLUSION

As loading stevedore, ENSIDESA's duties were not limited by 905(b), and the court of appeal's holding as to ENSIDESA's liability in that role is entirely correct. Further, since the court of appeal's holding as to ENSIDESA as vessel charterer is based upon ENSIDESA's conducting of the cargo loading operation (and not the supervision of the operations of a third party), its holding is likewise correct under 905(b). *Scindia Steam Nav. Co. v. De Los Santos,* 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981); *Howlett,* 512 U.S. ___, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994).

For these reasons, we respectfully suggest that Your Honors deny ENSIDESA's petition for writ of certiorari.

Respectfully submitted,



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Supreme Court, U.S.
FILED
JUL 20 1995
OFFICE OF THE CLERK

(3)

NO. 94-2034

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EMPRESA NACIONAL SIDERUGICA, S.A.,
Petitioner,

versus

JERRY YOUNG,
Respondent.

On Petition For Writ Of Certiorari To The
Louisiana Court Of Appeal For The Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES

The following are parties to this proceeding:

1. Jerry Young, plaintiff/respondent;

2. Cooper/T. Smith Stevedoring Company, Inc.,[1] intervenor/respondent; and

3. Empresa Nacional Siderurgica, S.A. - defendant/petitioner.

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1 Pursuant to Supreme Court Rule 29.1, Cooper/T. Smith Stevedoring Corporation is the parent company of Cooper/T. Smith Stevedoring Company, Inc.; River Grain Elevators, Inc. and Paco Terminals, Inc. are the only two non-wholly owned subsidiary companies of Cooper/T. Smith Stevedoring Company, Inc.

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NO. 94-2034

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EMPRESA NACIONAL SIDERUGICA, S.A.,
Petitioner,

versus

JERRY YOUNG,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

On November 22, 1982, Jerry Young (hereinafter "Young"), a longshoreman employed by Cooper/T. Smith Stevedoring Company, Inc. (hereinafter "Cooper"), was injured while offloading a cargo of steel I-beams from the M/V LORENA, an oceangoing cargo vessel that was owned and operated by Armadores de Cabotaje, S.A. (hereinafter "ARCASA") and voyage chartered by Empresa Nacional Siderurgica, S.A. (hereinafter "ENSIDESA"). ENSIDESA, pursuant to a charter party with ARCASA, loaded, stowed

and arranged for discharge of the cargo of I-beams. ENSIDESA employees prepared a stowage plan for the cargo, which was approved by the master of the M/V LORENA, an employee of ARCASA.

ENSIDESA loaded the cargo of I-beams aboard the M/V LORENA in a "H" configuration, as opposed to the preferred "I" configuration. The "I" configuration is preferred because it does not destroy the wooden dunnage (scraps of wood placed between the layers of cargo), making the cargo easier and safer to discharge.

The M/V LORENA arrived in New Orleans in November 1982 to discharge a portion of its cargo. At this time, ENSIDESA hired Cooper to offload the cargo. Cooper's personnel inspected the vessel and her cargo before beginning the discharge operations. Despite the fact that the cargo was loaded in the "H" formation, the Cooper supervisor authorized the longshoremen to offload the cargo. Recognizing the situation, Cooper proceeded because neither ARCASA nor ENSIDESA provided an alternative means of offloading the cargo. As Cooper offloaded the cargo, the effects of the "H" beam loading method became more apparent. As the longshoremen worked farther down into the hold, the crushed nature of the wooden dunnage became even more apparent. Indeed, at some locations, several bundles of I-beams were resting directly on the bundles below them.

In order to discharge the cargo, the longshoremen, including Young, were required to "nip" the beams by trying to wedge a "breakout wire" under the edge of the bundle of

beams. Once the steel wire was beneath an end of a beam, the crane operator would lift the beam slightly enabling the longshoremen to place the chain which is actually used to lift the cargo beneath the slightly raised beams. This procedure is then utilized again on the other end of the bundle of beams. While attempting to nip a bundle of beams, a breakout wire slipped off, struck Young, and caused him to fall and sustain injuries.

In October of 1984, Young filed suit against ARCASA for vessel negligence pursuant to the Longshore and Harbor Workers' Compensation Act (hereinafter "LHWCA"), 33 U.S.C. §905(b). Cooper intervened in that action, seeking to recover payments of medical expenses and compensation benefits paid to and/or on behalf of Young pursuant to the LHWCA. Young later amended his Petition to name ENSIDESA as a defendant as well. ARCASA and ENSIDESA both filed Cross-Claims for indemnity against the other. After a jury trial on April 17, 1989, the jury returned a verdict, finding ARCASA 15 percent at fault and ENSIDESA 85 percent at fault in causing Young's damages.

The District Court's judgment also recognized Cooper's lien for compensation benefits. Immediately prior to the trial, the District Court severed Cooper's intervention, presumably so that it would be tried at a later date. However, all parties subsequently agreed to the amount and nature of Cooper's lien, and included Cooper's lien in the final judgment. Because Cooper's recovery is dependent on Young's recovery in the main demand, Cooper now appears before this Honorable Court as a respondent to ENSIDESA's Petition for Writ of Certiorari.

ARCASA and ENSIDESA both appealed to the Fourth Circuit Court of Appeal of the State of Louisiana. The Louisiana Fourth Circuit reversed the District Court's dismissal of ARCASA's Cross-Claim, ordering ENSIDESA to indemnify ARCASA, and also reduced the damage award. All other aspects of the Judgment were affirmed. *Young v. Armadores de Cabotaje, S.A., et al*, 617 So.2d 517 (La. App. 4th Cir. 1993). Writ Applications to the Louisiana Supreme Court were denied. 625 So.2d 170, 171 (La. 1993).

Both ENSIDESA and ARCASA petitioned this Honorable Court for a Writ of Certiorari to the Louisiana Fourth Circuit. ARCASA's Writ was granted, and the Louisiana Fourth Circuit's Judgment was vacated. *Armadores de Cabotaje, S.A. v. Young*, 512 U.S. ___, 114 S.Ct. 2701, 129 L.Ed. 2d 830 (1994). This Court remanded these proceedings to the Louisiana Fourth Circuit for further proceedings in light of *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. ___, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994). ENSIDESA's original Petition for Writ of Certiorari to this Court (No. 93-1040) was based on the allegation of jury misconduct, and did not raise any liability issue, including the issues of whether ENSIDESA was liable to the plaintiff as the charterer of the M/V LORENA, or whether ENSIDESA was liable to the plaintiff as the loading stevedore, as found by the Louisiana Fourth Circuit in its original opinion. This Court denied ENSIDESA's Petition for Writ for Certiorari. *Empresa Nacional Siderurgica, S.A. V. Young*, 512 U.S. ___, 114 S.Ct. 1067 (1994), attached at Appendix, A-1.

Further proceedings were held in the Louisiana Fourth Circuit. That Court agreed with ARCASA's argument, found that ARCASA had no liability to Young, and dismissed Young's claims against ARCASA. However, the Louisiana Fourth Circuit upheld the original Judgment against ENSIDESA, which was now found to be solely liable for Young's damages. 645 So.2d 1266 (La. App. 4 Cir. 1994). ENSIDESA applied for a Writ from the Louisiana Supreme Court, which was denied. ENSIDESA has now filed this Petition for Writ of Certiorari from this Honorable Court.

REASONS FOR DENYING ENSIDESA'S PETITION FOR WRIT OF CERTIORARI

In its original opinion, the Louisiana Fourth Circuit discussed the liability of ENSIDESA and held as follows:

> Under the facts of this case, the duty owed under *Scindia* [*Steam Navigation Co. v. De Los Santos*, 451 U.S., 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981)] by ARCASA is not significantly different than that owed by ENSIDESA under *Scindia*. Based upon the evidence, we are unable to say that the jury would have been clearly wrong to conclude that a "reasonable . . . time charterer would have perceived the dangers presented by the [stow]." See, *Woods [v. Sammisa Co., Ltd.]*, 873 F.2d [842] at 852. **In addition, ENSIDESA, as loading stevedore, clearly bears responsibility for the dangerous condition presented by the beams which it stowed. ENSIDESA breached its**

> **duty of reasonable care under all of the circumstances, in failing to load the vessel so that it could be off-loaded with reasonable safety.** (Emphasis added.)

Young, 617 So.2d at 528-529.

In addition to finding ENSIDESA liable to the plaintiff as the charterer of the vessel, the Fourth Circuit also found that ENSIDESA was liable because it was the loading stevedore, and as the loading stevedore it failed to properly stow the cargo.

In addition to all other reasons which may be advanced by Young, in his Brief in Opposition to the Petition for Writ of Certiorari, Cooper further argues that the Writ should be denied for the following reasons:

1. The Fourth Circuit's ruling on the issue of ENSIDESA's liability to Young is now the law of the case. Because ENSIDESA failed to appeal the liability issues in its original Petition for Writ of Certiorari filed with this Court, ENSIDESA has waived its right to advance those arguments at this time.

2. Irrespective of any arguments that ENSIDESA might advance regarding its liability to Young as the vessel owner/charterer in light of this Court's holding in *Howlett v. Birkdale Shipping Co., Inc.*, S.A., 512 U.S. ___, 114 S.Ct. 2057, 129 L.Ed.2d 78 (1994), ENSIDESA is still liable to the plaintiff as the loading stevedore. This Court's decision in *Howlett* addressed the vessel owner's duties to a longshoreman. It did not in any way address the

issue of a loading stevedore's liability to the employees of an unloading stevedore.

I.

THE HOLDING OF THE LOUISIANA FOURTH CIRCUIT REGARDING ENSIDESA'S LIABILITY IS LAW OF THE CASE BECAUSE ENSIDESA FAILED TO APPEAL THAT ISSUE TO THIS COURT, AND SOUGHT A WRIT OF CERTIORARI ONLY ON THE ISSUE OF JURY MISCONDUCT

In its Petition for Writ of Certiorari currently pending before this Court, ENSIDESA states:

> As a result of this denial, both ENSIDESA and ARCASA applied to this Court for a Writ of Certiorari raising issues of procedural and substantive law. ARCASA's application was docketed on December 23, 1992, and ENSIDESA's was on December 28, 1993. While ENSIDESA's Petition was denied, ARCASA's was granted on June 20, 1994 . .

Empresa Nacional Siderurgica, S.A. v. Young, No. 94-2034, Pet. at p.7.

What ENSIDESA fails to mention is that its application sought a writ only on the issue of jury misconduct. *See*, Petition in No. 93-1040. ENSIDESA chose not to appeal any liability issue to this Court. ENSIDESA's last opportunity to obtain relief from the Judgment died when its Petition for Writ of Certiorari was denied. Appendix, A-1. However, ARCASA's writ was granted, and the original

Judgment was vacated and remanded to the Louisiana Fourth Circuit for further proceedings. Even though ENSIDESA's writ was denied and ENSIDESA failed to appeal any liability issue, ENSIDESA has nevertheless attached itself to ARCASA's coattails and is attempting to obtain a second chance to appeal the liability issues.

Cooper submits that ENSIDESA's appeal is foreclosed, and the Fourth Circuit's original ruling has become law of the case, and ENSIDESA cannot continue to prosecute this Petition for Writ of Certiorari.

As far back as 1939, federal courts have recognized the doctrine of law of the case. In *Pike Rapids Power Co. v. Minneapolis, St. Paul & S.S.M.Ry. Co.*, 106 F.2d 891 (8th Cir. 1939) a first appeal was taken, the Judgment of the district court was modified, and the matter was remanded with instructions to vacate the original judgment and enter a new judgment not inconsistent with the opinion of the appellate court. A second appeal presented the question of whether on remand the lower court entered a judgment consistent with the opinion of the appellate court. During the first appeal, the original plaintiff made no contention that the claim for certain disbursements should be allowed as compensation for expropriation of property. The Eighth Circuit specifically found that that part of the judgment was never challenged, nor was there any motion filed to modify the judgment or the district court's mandate. In ruling on the second appeal, the Eighth Circuit held that although it had vacated and remanded the case previously:

> The [first] opinion of this court became the law of the case and is not open for reconsideration on this second appeal ... We can not on this appeal

> consider new issues, nor can we modify the previous opinion and mandate of this court.

Pike, 106 F.2d at 894.

In *Williamsburg Wax Museum v. Historic Figures, Inc.*, 810 F.2d 243 (D.C. Cir. 1987), the Circuit Court for the District of Columbia, in discussing the law of the case doctrine, held:

> Under the law of the case doctrine, a legal decision made at one stage of the litigation, unchallenged in a subsequent appeal when the opportunity to do so existed, becomes the law of the case for future stages of the same litigation, and the parties are deemed to have waived the right to challenge that decision at a later time. The doctrine encompasses a court's explicit decisions, as well as those issues decided by necessary implication. The purpose of the doctrine is to "maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." (Citations omitted.)

Williamsburg Wax Museum, 810 F.2d at 250.

In discussing some of the policy reasons behind this doctrine, the Fifth Circuit Court of Appeals held in *Todd Shipyards Corp. v. Auto Transportation, S.A.*, 763 F.2d 745 (5th Cir. 1985) that:

> The law of the case doctrine, as formulated in this circuit, generally precludes reexamination of issues of law or fact decided on appeal, either by the district court on remand or by the appellate court

> itself on a subsequent appeal. This doctrine "is based on the salutary and sound public policy that litigation should come to an end." Indeed, if every question once considered and decided remained open for reexamination in subsequent proceedings in that same case, an appellate court could not efficiently or satisfactorily perform its duties. Moreover, the law of the case doctrine "discourages 'panel shopping' at the circuit level for in today's climate it is most likely that a different panel will hear subsequent appeals." Nevertheless, it is well established that the doctrine is not an inexorable command but a rule of practice, usually followed but limited in scope. (Footnote and citations omitted.)

Todd, 763 F.2d at 750.

Cooper submits that the law of the case doctrine should be applied in this case, and further submits that ENSIDESA waived its rights to subsequent appeals on the issue of its liability. As noted above, the Louisiana Fourth Circuit held that ENSIDESA was liable as the vessel owner/charterer, and also as the loading stevedore. ENSIDESA filed an application for a writ to the Louisiana Supreme Court, which was denied. ENSIDESA then sought a Writ of Certiorari from this Court; however, it only sought the Writ on the issue of jury misconduct. The liability issues were abandoned and waived at that point.

ENSIDESA's actions clearly bring this doctrine into play. First, the issue of liability went unchallenged when ENSIDESA sought its first Writ of Certiorari (No. 93-1040) from this Court. Following the reasoning of the United States Court of Appeal for the District of Colombia set out

in *Williamsburg Wax Museum*, *supra*, an unchallenged legal decision when the opportunity to do so existed becomes the law of the case for future stages of the litigation. ENSIDESA clearly had the right and the opportunity to challenge the decisions involving its liability when it sought its first Writ of Certiorari to this Court. ENSIDESA chose not to advance any arguments on that issue, and thereby waived its right to challenge that decision at some later time.

Cooper therefore submits that this Honorable Court should deny this new request for a Writ of Certiorari because ENSIDESA is raising liability issues which were waived when ENSIDESA previously sought a Writ of Certiorari from this Honorable Court over one year ago. By failing to take an appeal of this issue, ENSIDESA allowed the Louisiana Fourth Circuit's ruling on its liability to become law of the case.

II.

EVEN IF THE LOUISIANA FOURTH CIRCUIT'S RULING IS NOT LAW OF THE CASE, THE PETITION FOR WRIT OF CERTIORARI SOUGHT BY ENSIDESA MUST BE DENIED BECAUSE ENSIDESA WAS FOUND LIABLE AS THE LOADING STEVEDORE AND *HOWLETT V. BIRKDALE SHIPPING CO., S.A.* IS NOT APPLICABLE

ENSIDESA's Petition for Writ of Certiorari does mention, in passing, that it was the loading stevedore. However, the entire thrust of the Writ of Certiorari is directed to the issue of ENSIDESA's liability as the vessel owner/charterer. Although it might be argued that the

Louisiana Fourth Circuit did not follow the mandate set forth by this Court's Writ of Certiorari, Cooper submits that ENSIDESA's argument becomes irrelevant because the Writ, based on this Court's decision in *Howlett*, did not address the issue of ENSIDESA's liability as the loading stevedore. That issue was never appealed and this Court did not render any ruling which implicitly or explicitly suggested that the Louisiana Fourth Circuit's original decision was incorrect.

In all of the numerous appeals that have been filed in this case, the primary liability issue related the duties of a vessel owner/charterer pursuant to Section 905(b) of the LHWCA and this Court's decision in *Scindia*. Neither *Scindia* nor its progeny has ever suggested that the loading stevedore has the same obligations as a vessel owner.

In particular, the "turnover duty," which has become crucial in this case, simply does not apply to a loading stevedore. To apply the turnover duty to a loading stevedore would directly contradict the reasoning cited by the courts which have ruled on the issue. The courts that have looked at this issue have consistently found that the vessel owner/charterer is not an expert stevedore, and is not required to oversee an expert stevedore during the loading or unloading of its vessel. To do so would essentially make a vessel owner, which would be nothing more than an "amateur stevedore," the supervisor of a supposedly expert stevedore.

These factors were recently discussed by the United States Court of Appeals for the Fifth Circuit in *Couch v. Cro-Marine Transport, Inc.*, 44 F.3d 319 (5th Cir.), *reh'g en banc denied*, 50 F.3d 1035 (5th Cir. 1995). In *Couch*, a longshoreman employed by a discharging stevedore was injured while attempting to off-load steel cargo from a barge.

The district court found that the stevedore which loaded the barge had loaded it improperly, and also found that the improper stow contributed to Couch's accident.

The NOSC, the loading stevedore in *Couch*, argued that the duty it owed to a discharging stevedore is equivalent to the duty that a shipowner owes to a stevedore under *Scindia*. NOSC made an argument similar to ENSIDESA's argument, and submitted that it could not be held liable because the stow constituted an open and obvious condition. Under *Scindia*, a vessel owner does not have a duty to warn of open and obvious conditions, but must only warn of hidden defects. The Fifth Circuit disagreed with NOSC and affirmed the district court, holding:

> The district court refused to apply *Scindia*, citing crucial differences between the position of the vessel owner in relation to the discharging longshoremen and the position of the loading stevedore in relation to the discharging longshoremen. We hold that the district court was correct for several reasons.

Couch, 44 F.3d at 324. Just as ENSIDESA does in this case, NOSC in *Couch*, although using different reasoning, attempted to have the Fifth Circuit apply this Court's decision in *Howlett*. In rejecting this argument, the Fifth Circuit further held:

> In its supplemental brief and at oral argument on appeal, NOSC contends that [*Howlett*] strongly reinforces its argument that the *Scindia* standard should govern the relationship between the on-loading stevedore and the discharging longshoremen. The issue addressed by the Court

> in *Howlett*, a section 905(b) suit against a shipowner, was the scope of a shipowner's duty to warn of latent hazards in the cargo stow. Although *Howlett* elaborates the scope of the first *Scindia* duty, it does not help NOSC overcome the insurmountable hurdle of applying the *Scindia* standard to a case involving a suit by an injured longshoreman against a loading stevedore. *Scindia* and *Howlett* are section 905(b) cases brought against shipowners and do not support NOSC's contention that the *Scindia* standard should apply in this case, a negligence suit under the general maritime law against a party other than the vessel owner.

Couch, 44 F.3d at 325.

The Fifth Circuit also discussed the policy considerations for its holding, and considered the very nature of the parties to be crucial in rejecting the argument that *Scindia* and *Howlett* should be applied to a loading stevedore:

> In *Scindia* and *Howlett*, the Court considered the relationship between and roles of the stevedore-employer and the vessel owner. Emphasizing the role of the stevedore-employer as a specialist in cargo operations on one side and the non-expert vessel on the other side, the Court reasoned that, as between those two parties, the stevedore-employer was in the best position to prevent injuries to longshoremen. Unlike the shipowner in *Scindia*, NOSC, as loading stevedore, is indeed an expert in cargo operations, thus creating a very different relationship, with experts in stevedoring

> on both sides. Therefore, the reasoning of the court in *Scindia* for crafting a limited scope of liability for the non-expert vessel based on the justifiable expectations of the shipowner does not logically apply to the facts of this case. Accordingly, based on the facts of this case, the onloading stevedore was in the best position to avoid creating a dangerous stow and therefore may be held liable for any injuries suffered by discharging longshoremen caused by its negligent stow. (Footnote omitted.)

Couch, 44 F.3d at 325-326.

After discussing what law is applicable to the loading stevedore, the Fifth Circuit discussed the appropriate standard of care as follows:

> We hold that a loading stevedore must load the cargo so that an expert and experienced stevedore will be able to discharge the cargo with reasonable safety by exercising reasonable care.

Couch, 44 F.3d at 327.

As quoted above, the Louisiana Fourth Circuit found that ENSIDESA breached its duty of reasonable care under the circumstances because it failed to load the vessel so that the vessel could be offloaded with reasonable safety. The Louisiana Fourth Circuit's opinion clearly shows that the appropriate standard of care was used to find ENSIDESA liable to Young in its capacity as the loading stevedore.

The respondent submits that irrespective of whether or not *Scindia* or *Howlett* applies to ENSIDESA in its capacity

of vessel owner/charterer, those cases do not apply to ENSIDESA in its capacity as a loading stevedore. The Louisiana Fourth Circuit correctly found that in addition to any other liability, ENSIDESA was also liable as the loading stevedore. Clearly, the duties enunciated in both *Scindia* and *Howlett* do not apply to ENSIDESA in that capacity.

CONCLUSION

In summary, Cooper submits that ENSIDESA's Writ of Certiorari must be denied for two reasons. First, the issue of ENSIDESA's liability, in particular its liability as the loading stevedore, has become law of the case. In its previous Petition for Writ of Certiorari filed with this Court, ENSIDESA failed to raise any issues regarding its liability to Young, and chose only to argue the issue of jury misconduct. The Louisiana Fourth Circuit's ruling on that issue has become law of the case, and cannot be appealed further.

Secondly, ENSIDESA was originally found liable to the plaintiff as both the vessel owner/charterer and as the loading stevedore. Irrespective of what effect the *Howlett* decision may have on ENSIDESA's liability as the vessel owner/charterer, it clearly has no application to the issue of whether ENSIDESA is liable as the loading stevedore. As such, the Louisiana Fourth Circuit's ruling on that issue is correct, and no Writ of Certiorari should not be granted, and thereby give ENSIDESA further opportunity to continue these appeals, and prevent collection of the valid judgment obtained by Young and Cooper.

Respectfully submitted,

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APPENDIX A-1

EMPRESA NACIONAL SIDERURGICA, S.A., petitioner, v. Jerry YOUNG.

No. 93-1040.
Feb. 22, 1994.

Case below, *Young v. Armadores de Cabotaje, S.A.*, 617 So.2d 517; La. 625 So.2d 170; 625 So.2d 170; 625 So.2d 171.

Petition for writ of certiorari to the Court of Appeal of Louisiana, Fourth Circuit, denied.

(4)

NO. 94-2034

Supreme Court, U.S.
FILED
AUG 25 1995
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1995

EMPRESA NACIONAL SIDERURGICA, S.A.,
Petitioner,

v.

JERRY YOUNG,
Respondent,

PETITION FOR A WRIT OF CERTIORARI
TO THE LOUISIANA FOURTH CIRCUIT
COURT OF APPEAL

PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

There is no escaping the conclusion that the Louisiana Fourth Circuit Court of Appeal ignored the intent of this Court's earlier Writ, and wrote an amended opinion that was simply result oriented. Because the Fourth Circuit's opinion is badly reasoned, Respondents' efforts to defend it stretch legal logic, and in fact highlight the reasons why this case is suitable for a "double remand".

In their initial opinion, the Fourth Circuit found a breach of the first *Scindia* duty, the turnover duty. The "open and obvious" defense was inapplicable to this duty, they said. However, this Court saw fit to vacate the judgment, and remand the case for consideration in light of *Howlett*, a case dealing with the open and obvious defense. In order to achieve the desired result, the Fourth Circuit, in their amended opinion, again found that the open and obvious defense applied only to the corollary to the turnover duty, *i.e.* the duty to warn, and not to the turnover duty itself. In what amounts to an avoidance maneuver, they absolved the vessel owner, and proceeded to find liability on the party of ENSIDESA as time-charterer (sic) and loading stevedore. This was the cue for respondents to jump to the defense of the Fourth Circuit and argue that ENSIDESA was found liable under a totally separate legal theory, and that this theory of liability remained unaffected throughout the appeals process. This argument is as full of holes as swiss cheese.

Firstly, as to the argument that there was a failure to object to a jury charge, there was in fact *no* "loading stevedore" charge. There were only *Scindia* charges, the first being the "reasonable

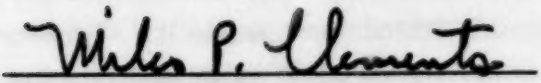
care under the circumstances" charge relating to the turnover duty. The jury interrogatories on the other hand contained only a single question relating to ENSIDESA's liability "as charterer of the vessel and/or loading stevedore" (thus leaving purely to speculation on just what basis the jury thought it was imposing liability). Given the actual instructions, the basis of the jury's finding was a breach of the *Scindia* duties. This Court expressly dealt with the *Scindia* duties in *Howlett*. The judgment in this case was vacated specifically on that basis. The failure to object to a jury charge or some such procedural issue is a red herring. What actually happened is that the Fourth Circuit misinterpreted the *Scindia* duties in its first opinion, and compounded the error in its second by refusing to admit that the open and obvious defense applies to both the turnover duty and the duty to warn. Then, in the avoidance maneuver, they simply said that ENSIDESA was liable for creating a "dangerous condition" in the stow. This is just another way of describing a breach of the turnover duty, and nowhere does the opinion refer to any failure to object to any jury charge, or expressly base its finding of liability on the general maritime law. The Fourth Circuit used a *Scindia* analysis, pure and simple, faulty though it may be, and it is incorrect to argue that the court found ENSIDESA liable on a totally distinct cause of action, and that the jury was charged on this cause of action, without challenge.

The incorrect premise upon which the above procedural argument is based is then used to bootstrap a "law of the case" argument. With respect, the law of the case is what *this* Court says it is. To argue that some "finding" was acceded to by ENSIDESA, is missing the point. This Court vacated the Fourth Circuit's

judgment. To their credit the Fourth Circuit understood at least that much, and nowhere in their amended opinion is there any reference to procedural issues regarding jury charges or to any particular finding of theirs supposedly based on the general maritime law that they determined was now the law of the case. Most importantly, they absolved a co-defendant and *increased* the liability of ENSIDESA based on a *Scindia* analysis, a finding which ENSIDESA may and does appeal. There was no independent basis for liability analyzed and expressed as a separate legal theory. Nowhere in the opinion do the words "general maritime law" appear. And furthermore, how can an increase in percentage and, consequently, monetary damages suddenly become unappealable?

Respondents' reliance on *Couch* is likewise illustrative of their faulty logic, and actually supports ENSIDESA's position. In that case, the Federal Fifth Circuit decided that there was no cause of action against the loading stevedore under the *Scindia* duties at all, as interpreted in *Howlett*, which is precisely what ENSIDESA argues here. The Fifth Circuit may well have found a cause of action framed in terms of general negligence principles, but that is not the basis of the liability finding in our case. The difference is that the Louisiana Fourth Circuit has found ENSIDESA liable based on a *Scindia* analysis, as did the jury, a finding disapproved of by this Court. That is exactly what is wrong with the judgment in this case, and why the case should be remanded again.

Respectfully submitted,



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